United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7047

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JUDY C. EGELSTON,
Plaintiff-Appellant,

-vs-

STATE UNIVERSITY COLLEGE AT GENESEO;
STATE UNIVERSITY COLLEGE OF ARTS AND
SCIENCES, DIVISION OF EDUCATIONAL STUDIES,
STATE UNIVERSITY COLLEGE AT GENESEO;
THOMAS COLAHAN, VICE-PRESIDENT FOR
ACADEMIC AFFAIRS, STATE UNIVERSITY COLLEGE
AT GENESEO; NICK LAGATTUTA, DEAN OF
EDUCATIONAL STUDIES, STATE UNIVERSITY
COLLEGE AT GENESEO, GENESEO, NEW YORK,

Defendants-Appellees,

BRIEF OF PLAINTFF-APPELLANT

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STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 (e)

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggreived has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggreived within three hundred days after the alleged unlawful employment practice occurred, or within thirty dyas after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. 1983

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Constitution, Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws

STATEMENT OF ISSUES PRESENTED

1. Does the complaint state a claim of employment discrimination pursuant to Title VII of the Civil Rights Act of 1964?

2. Has plaintiff properly perfected her claims of employment discrimination pursuant to Title VII of the Civil Rights Act of 1964?

3. Does the complaint state a claim against any and/or all of the defendants pursuant to 42 U.S.C. 1983?

4. When a claim of employment discrimination is properly pleaded pursuant to 42 U.S.C. §1983 may a court refuse to hear those claims by observing that a plaintiff "...has an adequate remedy under State law which is presently being pursued."

5. Does the complaint state a claim of employment discrimination pursuant to the Fourteenth Amendment of the United States Constitution?

STATEMENT OF THE CASE

This is an appeal from the Order and Decision of The Honorable Harold P. Burke, Judge, United States District Court for the Western District of New York dated December 31, 1975 and dismissing plaintiff's complaint of employment discrimination against the defendants brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 1983 and the Fourteenth Amendment of the United States Constitution. The Order and Decision which is unreported appears in the Joint Appendix at pages 146-148.

Plaintiff filed this lawsuit for injunctive relief, declaratory judgment and money damages to redress acts of discrimination in employment on the basis of sex on January 6, 1975. (A. 1) The action was commenced within ninety days of plaintiff's receipt of a Right to Sue Notice from the United States Department of Justice on October 10, 1974. (A. 4, 16)

The filing of the lawsuit was preceded by plaintiff's complaining of the employment discrimination practiced by the defendants to both State and Federal agencies. On January 24, 1973, plaintiff filed her claims with the Federal government by letter to the Office of Federal Contract Compliance. (A. 104)

1. References are to pages in the Joint Appendix.

She filed her claims with the New York State Division of Human Rights on or about February 9, 1973. (A. 42) The Division investigated all of the claims and found "probable cause" to believe discrimination has and is being practiced by the defendants. The Division issued its determination February 25, 1974. Thereafter, the Division rejected the defendants' application for reopening by order of July 19, 1974 and directed that the case proceed to public hearing. (A. 43)

Plaintiff was unrepresented by counsel in any of these matters until June, 1974. (A. 113, 116, 139) Plaintiff filed particulars of her claims of employment discrimination with the Equal Employment Opportunity Commission on or about June 20, 1974, noting that she had previously perfected her claims of discrimination by her letter to the Office of Federal Contract Compliance of January 24, 1973 and her claims filed with the New York State Division of Human Rights on or about February 9, 1973. (A. 116-127)

The Equal Employment Opportunity Commission at first incorrectly indicated to the plaintiff that it did not have jurisdiction of the claims but then notified plaintiff that pursuant to EEOC Decision No. 71-1115, the charge plaintiff had filed with the Office of Federal Contract Compliance is deemed to have been filed with the Commission and therefore filed within the time limits set forth in Title VII of the Civil Rights Act of 1964. (A. 128, 129) Plaintiff thereafter

requested that the United States Department of Justice issue the Right to Sue Notice. (A. 130, 131) The notice was issued and this lawsuit was thereafter commenced.

Plaintiff Egelston was an assistant professor in the Division of Educational Studies of the State University College at Geneseo from on or about September, 1970 through June, 1973. Plaintiff Egelston claims that the defendants maintain a policy, practice, custom and usage of discriminating against her and other women similarly situated because of sex with respect to compensation, terms, conditions and privileges of employment and that defendants limit, segregate and classify their employees in ways which have deprived and do deprive her and other women similarly situated of equal employment opportunities. Plaintiff claims that defendants exclude women from certain job classifications, that the defendants recruit employees so as to place women in low paying jobs while placing men in higher paying jobs; plaintiff claims that the defendants have a practice of recruitment which is directed to seeking and hiring only men for the best paying, career oriented jobs while seeking and hiring women for the low paying, low classified jobs. Plaintiff claims that the defendants deny women training opportunities, deny women equal pay for equal work and retaliate against women for complaining of the illegal discriminatory practices. (A. 5-8)

Plaintiff alleges that for example, when she was hired by the defendants as an assistant professor in the Division of Educational Studies in or about September, 1970 she was given a starting salary of $11,000 per year while a man, hired at the same time, and having lesser qualifications and background for the position than she, was given a starting salary of $11,750. Plaintiff claims that throughout her employment, solely because of her sex, the defendants paid her less than males who have the same or similar qualifications and experience and who perform the same or similar work. (A. 8)

In or about March, 1972, the Retention-Promotion-Tenure Committee of the defendant college recommended plaintiff Egelston for a two-renewal of her contract. Defendants Colahan and Lagatutta refused to renew plaintiff's contract solely because of her sex, giving plaintiff notification of non-renewal on or about May 15, 1972. (A. 9,10) Notwithstanding the protests of the Retention-Promotion-Tenure Committee, the defendants refused to reconsider the non-renewal decision. (A. 8,9)

Plaintiff complained to the defendants that the non-renewal was part of a pattern, practice, custom and usage of the defendants to discriminate against its women employees. The defendants retaliated against her by refusing to honor her request to teach in the 1972 summer school sessions. Defendants further retaliated against plaintiff for her complaining of employment discrimination by notifying her husband of non-renewal

of his teaching contract, subsequent to defendants having notified her of non-renewal. Plaintiff alleges that the defendants are still retaliating against her for having complained of employment discrimination by "blackballing" her and her husband in the State University system and preventing her and her husband from obtaining further employment in the State University System. (A. 9, 10)

Plaintiff's existing contract was completed June, 1973. Thus, while yet an employee of the defendants, plaintiff complained of all of the above noted acts of employment discrimination which are at issue in this lawsuit to both federal and state agencies.

Rather than answer plaintiff's complaint herein, defendants moved on or about January 29, 1975 for the issuance of a subpoena for the production of the file of the Equal Employment Opportunity Commission respecting plaintiff's claims and for an extension of time in which to answer the complaint. (A. 18-24) Plaintiff opposed such application noting that since there were independent bases for jurisdiction of all of plaintiff's claims under 42 U.S.C. 1983 and the Fourteenth Amendment, which defendants did not dispute, there was no reason to delay defendants' answer. Further, plaintiff pointed out that there was no need to issue a subpoena for the file of the Equal Employment Opportunity Commission since attorneys for the defendants could examine the Commission file as readily

as attorney for plaintiff. All of plaintiff's claims had been properly filed with the Commission; the defendants had had full notice of all plaintiff's claims filed with the Commission. (A. 25-39)

Without any notice to plaintiff, attorneys for the defendants abandoned their request for subpoena to inspect the files of the Equal Employment Opportunity Commission respecting plaintiff's claims, and at time of argument of their motion to issue a subpoena for the files of the Commission, asked the court instead to issue a subpoena for the files relating to plaintiff's complaints to the Office of Federal Contract Compliance. Plaintiff opposed this application, again pointing out that there were three independent bases for jurisdisction of plaintiff's claims, defendants had had full knowledge of all of plaintiff's claims as she was filing the claims with various government agencies and there was no reason to delay in answering plaintiff's complaint. (A. 40-43) The court orally granted the request to issue the subpoena to the Office of Federal Contract Compliance and took under advisement defendants' motion and plaintiff's cross-motions.

In the meantime, on or about February 18, 1975, plaintiff caused notices of deposition to be served for the testimony of defendants Colahan and LaGattuta. (A. 45-48) At the same time, plaintiff served Notice to Produce. (A. 49-56) The deposition of Nick LaGattuta was scheduled for the offices of

attorney for plaintiff on February 25, 26 and 27, 1975 and the deposition of Thomas Colahan was scheduled for the offices of plaintiff's attorney on March 5 and 7, 1975. Documents were to be produced at the offices of plaintiff's attorney on March 20 and 21, 1975.

When attorneys for defendants did not produce either defendant for depositions nor agree to other convenient dates for the depositions and when the defendants did not produce any of the documents as required by the Notice to Produce, plaintiff moved by Notice of Motion dated April 15, 1975 to compel discovery. (A. 58-64) Plaintiff pointed out that defendants had made no timely application to the court excusing them from appearing at depositions or excusing the production of documents. Accordingly, plaintiff sought a preclusion order and/or an order compelling appearance for depositions and production of documents and granting of costs, disbursements and attorney's fees to the plaintiff for the motion to compel.

Thereafter, by affidavit of May 7, 1975, defendants sought a protective order from some of the discovery sought. (A. 66-72) At the same time, defendants cross moved to dismiss plaintiff's claims brought under Title VII, alleging that those claims had not been properly filed because there was an "initial" filing with the Federal government rather than the State and plaintiff did not properly file her claims within the one hundred and eighty days that defendants alleged was the applicable time period for filing. While acknowledging the court

had jurisdiction of plaintiff's claims pursuant to 42 U.S.C. 1983, defendants urged that the court dismiss those claims since "...plaintiff has, and is pursuing, an adequate remedy under State law." (A. 95-103) Defendants suggested that plaintiff's allegation of denial of equal protection "...can be adequately resolved before the State Division of Human Rights and, if necessary before the State Supreme Court." (A. 102)

Plaintiff opposed the motion to dismiss pointing out that the court has jurisdiction in any event because even the defendants admit the court has jurisdiction pursuant to the Constitution and 42 U.S.C. 1983. Plaintiff underscored that the defendants' suggestion that the court should decline jurisdiction because there might be some state remedy available was a proposition long rejected by the Federal courts in considering claims of violation of Federal laws filed in Federal courts. Plaintiff underscored that her claims of employment discrimination filed pursuant to Title VII of the Civil Rights Act of 1964 were timely filed. The initial filing with the Office of Federal Contract Compliance constituted a filing with the Equal Employment Opportunity Commission and with the New York State Division of Human Rights because the Federal government by regulation has provided that such initial filing constitutes filing for both purposes and the Equal Employment Opportunity Commission has a written contract with the New York State Division of Human Rights whereby filings with each

agency constitute filings with the other agency. (A. 132-140) Plaintiff pointed out the relevancy of each discovery demand to the claims and requested that the court compel discovery without further delay. (A. 133-138)

The Equal Employment Opportunity Commission sought leave to appear amicus curiae in support of plaintiff's claim that she had properly filed her claims pursuant to Title VII. (A. 142-145) The Comission submitted its brief to the court.

By Order and Decision dated December 31, 1975, The Honorable Harold P. Burke dismissed the complaint as to all defendants. The court ruled that plaintiff had not timely filed her claims under Title VII because "In the circumstances of this case the statute requires filing within one hundred and eighty days after the alleged unlawful employment practice occurred." The court held that a state entity could not be sued under 42 U.S.C. 1983 because it is not a "person" within the meaning of the statute. The court ruled that it was dismissing the claims against the individual defendants pursuant to 42 U.S.C. 1983 because "The plaintiff has an adequate remedy under State law which is presently being pursued." The court did not discuss plaintiff's claims under the Fourteenth Amendment except to allude to them by stating that "There is no reason for this court to entertain jurisdiction under 42 U.S.C. 1983 and 28 U.S.C. 1343." (A. 146-148)

Plaintiff appeals on the law and the facts and from each and every part of Judge Burke's Order.

ARGUMENT

POINT I

THE COMPLAINT STATES A CLAIM PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964; PLAINTIFF HAS PROPERLY FILED HER CLAIMS PURSUANT THERETO

Plaintiff's claims of employment discrimination are typical of numerous other complaints of employment discrimination that have been found to be sufficient. See for example, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F. 2d 496 (5th Cir. 1968); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Plaintiff claims that throughout her employment with the defendants from September of 1970 through June of 1973, she was denied equal terms, conditions and privileges of employment. She and other women have been and are being denied equal pay for equal work, non-discriminatory recruiting practices, classification practices, transfer practices, promotion practices and training opportunities, for example. Because she complained of these illegal practices, the defendants have retaliated against her; that retaliation continues to date with the defendants denying her opportunities to be employed in the State University system.

Plaintiff's claims of employment discrimination are claims of continuing discrimination. As the Equal Employment Opportunity Commission has noted in its procedure manual, Section 208, a copy of which is attached hereto as Appendix A, an attack on a current employment practice states a charge of continuing discrimination since a policy by nature is continuing. Such a charge is timely filed when received by the Commission.

Courts have long recognized the continuing nature of employment discrimination acts and have held that time for the initiation of the running of the statutory requirement for filing a complaint runs from the cessation of the discriminatory activity. In other words, the statute of limitations does not begin to run until the challenged act or the employment relation ends. Dudley v. Textron, Inc., Burkart-Randall Division, 386 F. Supp. 602 (E.D. Pa. 1975). Courts have found allegations of continuing discrimination sufficient in many different contexts, even when the allegation is merely that the discrimination continues. Pacific Maritime Association v. Quinn, 491 F. 2d 1294 (9th Cir. 1974). In Belt v. Johnson Motor Lines, Inc., 458 F. 2d 443 (5th Cir. 1972) the court found continuing discrimination stated where the plaintiff had made two written applications for transfer and subsequent oral reapplications. In Rich v. Martin-Marietta Corp.,522 F. 2d 333 (10th Cir. 1975),

the court held that plaintiff's challenge to the promotion system was sufficient allegation of continuing violation. In Bartmess v. Drewrys U.S.A., Inc., 444 F. 2d 1186 (7th Cir. 1971), cert den. 404 U.S. 939 (1971), the court found that a company's maintenance of a discriminatory retirement plant constituted a continuing act of discrimination. In Cox v. United States Gypsum Co., 409 F. 2d 289 (7th Cir. 1969), the court found continuing discrimination properly pleaded when the complainant merely used the word "continuing" to characterize the discrimination. In Macklin v. Spector Freight Systems, Inc., 478 F. 2d 979 (D.C. Cir. 1973), the court construed the complaint as an attack on a discriminatory hiring system which continued to exist and which continued to operate to deny complainants jobs to which they claimed to be entitled.

As previously noted, plaintiff's employment with the defendants continued under an existing contract to June of 1973. The discriminatory acts of the defendants against the plaintiff continue even to date. Even while plaintiff was still employed by the defendants she had filed all her claims of discrimination which are now in issue in this lawsuit with both Federal and state agencies. She filed her letter of complaint with the Office of Federal Contract Compliance on January 24, 1973. She perfected her claims of discrimination with the New York State Division of Human Rights with the filing of a complaint on or about February 9, 1973. She filed verified particulars

of her claims with the Equal Employment Opportunity Commission in June of 1974.

In light of the continuing nature of plaintiff's claims, defendants' focus on the "timeliness" of the filing of those claims is simply misplaced. Since the discrimination continues to date, the statute of limitations has not even commenced to run with respect to filing under Title VII. But the point is even so, not dispositive of the questions since plaintiff duly complained to Federal and state agencies of all of the continuing employment discrimination practiced against her and other women by the defendants while plaintiff was still in the employ of the defendants.

Even if this complaint were not construed, for the sake of argument, as a complaint of continuing employment discrimination, plaintiff has met all the jurisdictional prerequisites to filing of a claim pursuant to Title VII of the Civil Rights Act of 1964. Plaintiff need only (1) file a complaint within three hundred days of the alleged discrimination and (2) commence a Federal lawsuit within ninety days of receipt of the Right to Sue Notice. 42 U.S.C. 2000 (e)-5(e) and 42 U.S.C. 2000(e)-5(f)(1).

Defendants concede that plaintiff has filed this lawsuit within ninety days of receiving her Right to Sue Notice. Defendants have challenged the ruling of the Equal Employment Opportunity Commission that plaintiff's letter of complaint to the Office of Federal Contract Contract Compliance constitutes

filing with the Equal Employment Opportunity Commission and/or the defendants have accepted the filing of plaintiff's letter of complaint with the Office of Federal Contract Compliance as the filing date and have then argued that the filing must be within one hundred and eighty days rather than three hundred days because the "initial" filing of the claims was not with the state agency.

Filing with the Office of Federal Contract Compliance constitutes a filing with the Equal Employment Opportunity Commission. Equal Employment Opportunity Commission v. Collator Corp., ___F.2d _____, 8 EPD 9481 (9th Cir. 1974); EEOC Decision No. 71-1115, March 8, 1972. The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance have provided by regulation that the filing with the Office of Federal Contract Compliance constitutes the filing with the Equal Employment Opportunity Commission. 35 F.R. 8461. (The present memorandum of understanding appears at 39 F.R. 35855.)

Not only does plaintiff's filing with the Office of Federal Contract Compliance constitute timely filing of the charge with the Federal government, but plaintiff's timely filing of the charge with the New York State Division of Human Rights constitutes timely filing of that charge with the Federal government. The Equal Employment Opportunity Commission also has a memorandum of understanding, June 7, 1971, with the New York State Division of Human Rights. By virtue

of that understanding, it is understood that a filing of a complaint with a state agency [illegible]o constitutes timely filing with a Federal agency and vice versa. As the Supreme Court noted in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the interpretation of Title VII of the Civil Rights Act of 1964 by the Equal Employment Opportunity Commission is entitled to great weight since the Commission is the duly constituted enforcing agency of Title VII. The Commission in this case, briefed the question of timeliness to the court below and supported plaintiff's contention that her claims were timely filed pursuant to Title VII.

Thus, even if for the sake of argument, we would say that all of plaintiff's claims accrued on or about May 15, 1972 when she was notified of non-renewal of her contract, all of her claims of employment discrimination were filed both in the Federal and state governments within three hundred days-whether the initial filing of those claims is construed to be either the January 24, 1973 filing with the Office of Federal Contract Compliance or the February 9, 1973 filing with the New York State Division of Human Rights.

Title VII is remedial legislation and must be liberally construed to facilitate the Congressional objective of eradicating immediately all vestiages of employment discrimination. The strained arguments that the defendants assert to challenge the Title VII claim "...are particulary inappropriate in a statutory

scheme in which laymen, unassisted by trained lawyers, initiate the process." Love v. Pullman Co., 404 U.S. 522 (1972).

The defendants in arguments to the court below try to disregard plaintiff's various filings with the state and Federal government agencies by suggesting that there is a difference between claims she is pursuing. Defendants have tried to construe plaintiff's claims filed with the state agency as "individual" and plaintiff's claims filed with Federal agencies as "class".

As previously noted,plaintiff was unrepresented by counsel until June of 1974. She as a lay person tried to cope with the various Federal and state administrative agencies in perfecting her claims. She filed her claims in all appropriate forums in a timely fashion and conveyed, as best as a lay person can be expected to convey, the substance of those claims.

Once plaintiff had a lawyer, she filed detailed particulars of her Federal claims with the Equal Employment Opportunity Commission. The Commission file has been open to the defendants and the defendants have had notice of plaintiff's claims in detail pursuant to Title VII, since June of 1974.

There is no merit as a matter of law to defendants' distinction of plaintiff's claims as "individual" in one instance and as "class" in another instance. Plaintiff has always claimed that she has been harmed by the discriminatory acts of the defendants and that she is only one of a number of persons who have been and are being harmed by defendants' discriminatory patterns, practices, customs and usages.

Characterization of an employment discrimination claim as "individual" or "class" has no ultimate substance since courts time and again have held that such a claim, though characterized as individual is by definition a class claim. Bowe v. Colgate-Palmolive Co.,416 F. 2d 711 (7th Cir. 1969). Discovery in an employment discrimination case reaches all aspects of an employer's employment practices regardless of whether that claim is characterized as an individual or a class claim. Green v. McDonnell Douglas Corp., 411 U.S. 792 (1973).

Plaintiff has properly stated a claim under Title VII and has properly filed those claims. The court below erred in dismissing plaintiff's claims pursuant to Title VII. The court ignored the continuing nature of plaintiff's claims in ruling that she had not timely filed her claims. Further the court erred in concluding that the relevant time period for the filing of claims under Title VII is one hundred and eighty days rather than three hundred days when there is a state employment discrimination agency.

POINT II

THE COMPLAINT STATES CLAIMS PURSUANT TO 42 U.S.C. 1983

Repeatedly, plaintiff pointed out to the court below that any jurisdictional question defendants had respecting Title VII are not dispositive because plaintiff had two additional, completely independent and sufficient jurisdictional bases for all of her claims - 42 U.S.C. 1983 and the Fourteenth Amendment to the Constitution. Plaintiff claims that the

defendants, by their acts have denied her rights to equal terms, conditions and privileges of employment and have retaliated against her for complaining of illegal discrimination-all acts taken by the defendants under color of law. (A. 3,4, 11, 12)

The defendants specifically acknowledged the court's independent jurisdictional basis of plaintiff's claims pursuant to 42 U.S.C. 1983. However, the defendants asked the court below to decline to consider plaintiff's claims because of the pendency of her claims before the New York State Division of Human Rights.

Such an argument has been rejected by the courts. As the United States Supreme Court noted in Monroe v. Pape, 365 U.S. 167 (1961), §1983 of Title 42 of the United States Code was adopted in part, to afford a Federal right in Federal courts "...because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." Monroe v. Pape, supra at 180. Thus, in Monroe v. Pape, supra, the court ruled that a complaint against individual state officials brought pursuant to 42 U.S.C. §1983 and in a Federal court must proceed although the State of Illinois had legislation under which the plaintiff could seek the same or similar relief.

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one

> is invoked. Here the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." Monroe v. Pape, supra at 183.

The Second Circuit Court of Appeals in Voutsis v. Union Carbide, 452 F.2d 889 (2nd Cir. 1971), cert. denied, 406 U.S. 918 (1972) has ruled that the state remedies for employment discrimination and the Federal remedies for employment discrimination are separate and complete. The pendency of a claim before the state agency does not serve as a basis for avoiding consideration of the Federal claims.

> "The federal remedy is independent and cumulative, [citations omitted] and it facilitates comprehensive relief." [citation omitted.] Voutsis v. Union Carbide, supra at 893.

The United States Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), has underscored this point in noting that the Congress anticipated overlap of remedies between Federal and state laws in the area of employment discrimination since the objective of all remedies is to eliminate immediately all employment discrimination.

Section 1983 of Title 42 of the United States Code is a recognized jurisdictional basis for the litigation of employment discrimination claims where the allegation is that agents of a state, acting under color of law, have deprived one of equal

employment opportunities. Thus, it has been found that officers of fire departments[1], police departments[2], and transportation authorities[3] cannot engage in discriminatory employment practices. Nor can a public board of education[4] and public or semi-public hospitals[5], state employment services[6] engage in discriminatory employment practices.

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1 Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), modified, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950 (1972); Fowler v. Schwarzwalder, 348 F.Supp. 844 (D.Minn. 1972) and 351 F.Supp. 721 (D.Minn. 1972); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351 (N.D. Cal. 1972).

2 Bridgeport Guardians v. Bridgeport Civil Service Commission, 354 F.Supp. 778 (D.Conn. 1973), affirmed in part and reversed in part 482 F.2d 1333 (2d Cir. 1973), appeal after remand 497 F.2d 1113 (2d Cir. 1974) cert. den. 421 U.S. 991 (1975); Pennsylvania v. O'Neill, 348 F.Supp. 1084 (E.D. Pa. 1972), modified, 473 F.2d 1029 (3rd Cir. 1973); Castro v. Beecher, 334 F. Supp. 930 (D.Mass. 1971), modified, 459 F.2d 725 (1st Cir. 1972), consent decree on remand, 386 F.Supp. 1281, (D. Mass. 1973).

3 Arrington v. Massachusetts Bay Transportation Authority, 306 F.Supp. 1355 (D. Mass. 1969).

4 Chance v. Board of Examiners, 458 F.2d 1167 (2nd Cir. 1972); Jackson v. Wheatley School District No. 28, 430 F.2d 1359 (8th Cir. 970).

5 Chiaffitelli v. Dettmer Hospital, Inc. 437 F.2d 429 (6th Cir. 1971); Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970); Cypress v. Newport News General & Nonsectarian Hospital Association, 375 F.2d 648 (4th Cir. 1967).

6 Johnson v. Louisiana State Employment Service, 301 F.Supp. 675 (W.D. La. 1968).

The proof offered in an employment discrimination case under 42 U.S.C. 1983 or under Title VII of the Civil Rights Act of 1964 follows the same pattern. Discovery in an employment discrimination case is the same whether it be brought under Title VII or Section 1983. Thus, in Section 1983 cases, courts have specifically relied on EEOC Guidelines on Employee Selection Procedures in reaching findings of discrimination.[7] Just as in Title VII cases, courts in Section 1983 have relied on statistical disparities as evidence of discrimination;[8] they have

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[7] Carter v. Gallagher, 3 E.D.P. ¶8205 (D. Minn. 1971), aff'd in part, rev'd on other grounds, 452 F.2d 315 (8th Cir. 1971), modified on other grounds, en banc. 452 F.2d 327 (8th Cir. 1972); Fowler v. Schwarzwalder, 351 F.Supp. 721, (D. Minn. 1972); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351 (N.D. Cal. 1972); Coffey v. Braddy, No. 71-44- Civ.-J (M.D. Fla. 1971).

[8] See, e.g. Jackson v. Wheatley School District No. 28, 430 F.2d 1359 (8th Cir. 1970); Cypress v. Newport News General & Nonsectarian Hospital Association, 375 F. 2d 648 (4th Cir. 1967); Arrington v. Massachusetts Bay Transportation Authority, 306 F.Supp. 1355 (D. Mass. 1969); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351 (N.D. Cal. 1972); Morrow v. Crisler, 491 F.2d 1053 ,(5th Cir. 1973), cert. den. 419 U.S. 895 (1974)

held that proof of discrimination does not require proof of an intent to discriminate[9] and they have held that purportedly neutral practices which are not shown to be job-related are unlawful if their effects create statistical disparity or perpetutate past discrimination, and that the burden of proving job-relatedness is on the employer.[10]

The court below correctly pointed out that a state corporation is not a "person" within the meaning of 42 U.S.C. 1983. But, as the court below noted, plaintiff is suing individuals whom she allege acted under color of law to deprive plaintiff of equal employment opportunities. The court below erred when it concluded that notwithstanding that individuals were sued under 42 U.S.C. 1983, it would nevertheless decline to entertain those claims in the "exercise" of the court's "discretion"-apparently, because the court considered that the plaintiff has adequate remedies in the State of New York.

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[9] Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971), modified on other grounds, 452 F.2d 327 (8th Cir. 1972) (en banc), cert. denied, 406 U.S. 950 (1972); Shield Club v. Cleveland, 370 F. Supp. 251 5 E.P.D. ¶8406 (N.D. Ohio 1972); Ethridge v. Rhodes, 268 F.Supp. 83, 88, (S.D. Ohio 1967).

[10] See e.g. Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1973) where the court stated that:

> "The public employer must, we think, in order to justify the use of a means of selection shown to have a racially disproportionate impact, demonstrate that the means is in fact substantially related to job performance. It may not, to state the matter in another way, rely on any reasonable version of the facts, but must come forward with convincing facts establishing a fit between the qualification and the job."

POINT III

THE COMPLAINT STATES CLAIMS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The third independent jurisdictional basis for all of plaintiff's claims is the Fourteenth Amendment to the United States Constitution. Even if individuals were not alleged to be acting illegally, there is jurisdiction over the State University College at Geneseo and State University College of Arts and Sciences, Division of Educational Studies, State University College at Geneseo. Plaintiff pleads Federal question jurisdiction. A state entity would be liable even though no allegations were made of particular illegal acts of particular public servants (not the case herein). Kenosha v. Bruno, 412 U.S. 507 (1973); Harper v. Kloster, 486 F. 2d 1134 (4th Cir. 1973).

The denial of equal employment opportunities by a state government entity constitutes a denial of Fourteenth Amendment rights. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). The denial by the defendants herein of equal terms, conditions and privileges of employment to plaintiff and defendants' retaliating against plaintiff for her complaining of employment discrimination constitute violations of the Fourteenth Amendment. See also Green v. Waterford Board of Education, 473 F.2d 629 (2nd Cir. 1973).

The lower court seemed to ignore the jurisdictional basis for plaintiff's claims under the Fourteenth Amendment. The lower court alluded to those claims concluding that "There

is no reason for this court to entertain jurisdiction under 42 U.S.C. 1983 and 28 U.S.C. 1343." (A. 147,148) The court was clearly in error in dismissing plaintiff's claims under the Constitution against all defendants.

CONCLUSION

For the foregoing reasons, plaintiff requests that the court reverse the decision of the lower court finding that plaintiff's complaint states claims against all defendants upon three jurisdictional bases, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 1983 and the Fourteenth Amendment to the Constitution. The court should remand this case with directions that discovery as noticed by the plaintiff proceed immediately without further delay. All of the discovery requests of the plaintiff are proper in an employment discrimination case as courts time and again have underscored. Green v. McDonnell Douglas Corp., supra; Brown v. Gaston Co., Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), cert. denied 409 U.S. 982 (1972); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Leeway Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. den. 401 U.S. 954 (1971); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); United States v. Jackson Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert.den. 406 U.S. 906 (1972); Marquez v. Ford Motor Co., 440 F.2d 1157 (8th Cir. 1971); Graniteville Co. v. E.E.O.C., 438 F. d 32 (4th Cir. 1971).

Plaintiff has detailed the basis for each discovery request, (A. 133-138) and there is no basis for any further delay in the expeditious prosecution of these claims by the plaintiff.

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April 5, 1976

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief of plaintiff-appellant was served on the defendants-appellees by my causing two copies thereof to be mailed to Louis J. Leftkowitz, Attorney General of the State of New York, Kenneth J. Connolly, Esq., of Counsel, The Capitol, Albany, New York, 12223 this 5th day of April 1976.

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APPENDIX A

SECTION 208--CONTINUING VIOLATION

Contents

[¶ 4101]

208.1 Introduction - Policy/Policy-Application Distinction

A Charging Party may attack a current employment policy, in addition to past applications of that policy; and, since a policy is by nature continuing, a "policy" charge always is timely filed (See IM 204-Timeliness). Thus the Commission's jurisdiction vests when it receives a charge which merely alleges the current existence of an unlawful policy. The Commission's jurisdiction does not await proof that the alleged policy exists in fact, or has been applied within 180 (or 300) days of the filing date. These are facts relevant to the merits of the charge, rather than to the Commission's jurisdiction to investigate it.

Charges which do not specifically include the work "policy", or otherwise suggest a continuing course of conduct, normally may be read, in context, to allege a continuing, i.e., policy-type, violation. The purpose of this Section is to alert the reader to the policy/policy-application distinction and the "continuing violation" approach to seemingly untimely charges.

[¶ 4102]

208.2 Traditional or Past Practices as Evidence of Existence of Current Policy

Whether an allegedly continuing practice, i.e., a present policy, exists is, as noted above, a question of fact. Charging Party has the burden of proceeding on whether an alleged policy in fact was extant during the 180 or 300-day period preceding the filing of the charge and/or thereafter. Barring admissions from Respondent, Charging Party must evidence sufficient specific acts (hiring acts, promotion

acts, etc.) from which an underlying policy (discriminatory hiring policy, promotion policy, etc.) reasonably may be inferred. Those specific acts need not have occurred during the 180 or 300-day period; it is enough that they occurred over a period of time directly preceding the 180 or 300-day period. The Commission and the courts will infer, absent other facts, that the thus inferred policy carried over into, and in fact existed during, the 180 or 300-day period. U.S. v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969), 2 EPD 10,083; CD 70-396, CCH 6101; CD 71-1101, CCH 6198. See also Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969), 2 EPD 9988 and Tooles v. Kellogg Company, 336 F.Supp. 142 (D. Neb. 1972), 4 EPD 7661. In Tooles, the court stated:

> "This Court adopts what it finds the better view that where the discrimination has been of a continuing nature, as herein alleged, evidence of prior acts against plaintiff must be allowed, to show the continuing pattern of discrimination which has occurred and continued to occur within the 210 day limit preceding the date the complaint was brought.

[¶ 4103]

208.3 Specific Situations Held to Constitute Continuing Allegations

(a) PROMOTION

Where an individual is denied a promotion, but the reasons for such denial would continue to frustrate his future efforts to attain a similar position (e.g., lack of high school education; lack of departmental seniority; failure to pass test, etc.) the failure to promote the individual may be deemed to constitute a continuing policy. See CD 71-1151, CCH 6208. Accord: Mack v. General Electric Co., 329 F.Supp. 72 (E.D. Pa. 1971), 3 EPD 8272 at n.6. - "In addition, we think a denial of upgrading operates to discriminate against an employee at least until he is upgraded as he deserves and we thus regard a discriminatory failure to upgrade as a continuing violation of Title VII." Likewise, in Jamison v. Olga Coal Co., ___ F.Supp. ___ (D.W. Va. 1971), 4 EPD 7787, the court ruled that an allegation of discriminatory promotions was continuing as to general policies and as to the failure of unions to redress the situation even though a specific act complained of by Charging Party occurred more than 90 days prior to filing of the charge and, indeed, before the effective date of Title VII:

> ... the charge before the EEOC involved two separate areas of discrimination, one general

and one specific. While it is true that the specific (charge of discrimination with respect to the promotion, . .) relates to conduct on the parts of defendants prior to the effective date of Title VII and to an incident occurring more than 90 days before the filing of the charge . . . nevertheless the general charge of a denial of promotions to Negroes to better jobs and the failure on the part of the defendant unions to seek redress of such discrimination is not confined to the same time.

Accord, Tooles v. Kellogg, supra. But see, Jennings v. Illinois Central R.R. Co., ____ F.Supp. ____ (W.D. Tenn 1970), 3 EPD 8012, aff'd per curiam, ___ F.2d ___ (6th Cir. 1971), 3 EPD 8275.

(b) TRANSFERS

The same theory applies to requests for transfers as to promotions. In Belt v. Johnson Motor Lines, 458 F.2d 443 (5th Cir. 1972), 4 EPD 7751, the lower court held that oral reapplications for transfer would not make a prior rejection timely by establishing a continuing violation. HELD: reversed.

"We cannot agree with the district court that a discriminatory labor practice may not be a continuing act. To so hold the facts of this case would permit discriminatory acts to go unrebuked, a construction far too restrictive and alien to the liberal construction we have previously given the Civil Rights Act . . . there is no need to lock the courthouse door to his claim solely because he has alleged a contemporary course of conduct as an act of discrimination." (But see, Younger v. Glamorgan Pipe and Foundry Co., 310 F.Supp. 195 (W.D. Va. 1969), 2 EPD 10,059.)

(c) LAYOFF AND RECALL

Cox v. U.S. Gypsum, supra:

While layoff may be a single act, the failure to recall constitutes a continuing violation. "In so concluding we consider the following facts:

(1) A layoff, as distinguished from discharge or quitting, suggests a possibility of re-employment. (2) A layman's claim of "continuing" discrimination, after a discriminatory layoff, readily suggests that he claims there has been subsequent recall or new hiring which discriminates against him. (3) The record shows that the company had bound itself, by its collective bargaining agreement, to consider seniority in making a recall, and the agreement provides that an employee does not lose seniority by reason of layoff until one year has expired. (4) The Commission chose to accept these charges as timely. (5) The company received notices of other charges of similar current discrimination at or about the same time."

(d) PENSION PLANS

Leading case is Mixson v. Southern Bell Telephone and Tele. Co., 334 F.Supp 525 (N.D. Ga. 1971), 4 EPD 7606 and the companion Commission Decision, CD 71-1413, CCH 6225. The court concludes that Respondent's failure to pay widow death benefits is an allegation of a continuing violation. But see McCarty v. Boeing Company, 321 F.Supp 1100 (W.D. Wash. 1970), 3 FEP 8056.

(e) HIRING AND ADMISSION TO UNION

Watson v. Limbach Corp., ____ F.Supp. ____ (S.D. Ohio 1971), 4 EPD 7648. Charging Party applied for a job with Respondent Employer and membership in Respondent Union:

"It is the opinion of the court that since the complaint before us clearly alleges an ongoing pattern of discrimination against plaintiff and his class, it is not necessary that plaintiff be in strict compliance with §2000e-5d. . . [A] complaint . . may not be dismissed on the grounds that it was untimely filed where the suit challenges the maintenance of an alleged discriminatory system rather than one isolated instance . . ."

Accord: EEOC v. Local 189, Plumbers and Pipefitters, 311 F.Supp. 464 (S.D. Ohio 1970), 2 EPD 10,181; Dobbins v. Local 212, IBEW, 292 F.Supp. 413 (S.D. Ohio 1968). For the proposition that a hiring policy may constitute a continuing violation, see also CD 72-1702, CCH 6361.

[¶ 4104]

208.4 Continuing Violations - Mootness

Individual relief for Charging Party, or mootness of a specific application of a continuing policy, does not bar adjudication of the lawfulness of the policy itself. In Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971), 3 EPD 8247, the exact position sought by plaintiff was abolished during the pendency of the court action. Respondent sought to have the case dismissed for mootness. In approving denial of this motion the court reasoned that:

> Similarly here, the burden which Southern Pacific's general labor policy and the state statutes in question place on Southern Pacific's employment of women remains and controls the company's future work assignments. Moreover, the fact that this cause arose under Title VII of the Civil Rights Act of 1964 provides additional support for the view that the action has not been mooted by the closing of the Thermal agency. That Title is so designed that, in the attainment of its objectives, the administrative agency primarily renders a conciliation service. The ultimate sanction is judicial enforcement initiated by individuals who are aggrieved. Section 706(e) of the Act, 42 U.S.C. §2000e-5(e). In many such cases, including this one, declaratory and injunctive relief is sought, the need for which is not necessarily dependent upon proof that a particular discrimination has continued.
>
> Thus, while the resulting litigation is private in form, it is intended to effectuate the policies of the legislation. So considered, such a suit constitutes more than the assertion of a private claim and, consequently, it is not necessarily defeated by the disappearance of the particular grievance which gave rise to the action. The controverted issue of unlawful employer discrimination remains; it may, and should be, judicially resolved and relief granted or denied. See Jenkins v. United Gas Corp., 400 F.2d 28, 30-33, (5th Cir. 1968), 1 EPD 9908.
>
> The discontinuance of the particular grievance which gave rise to this action may call for a denial of some of the relief requested. See Parham v. Southwestern Bell Tel. Co., 3 EPD 8021 433 F.2d 421, 429 (8th Cir. 1970). It does not moot the litigation.

[Section 209 begins on page 3651.]